LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 24 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 2 and 717

RED LION BROADCASTING CO., INC., *et al.*,
Petitioners,

—v.—

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

—v.—

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *et al.*

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

MICHAEL J. HOROWITZ
401 Broadway
New York, New York 10013
Attorney for American Civil Liberties Union

MELVIN L. WULF
ELEANOR HOLMES NORTON
156 Fifth Avenue
New York, New York 10010
Of Counsel

INDEX

PAGE

Interest of *Amicus* 1

Statement of the Case 3

ARGUMENT:

The First Amendment does not command insulation of broadcasters from rules designed to effect fair access to public airwaves. The fairness doctrine and the rules thereunder are wholly within the ambit of the First Amendment and affirmatively foster the interests the Amendment was intended to serve 4

A. The Challenged Rules Are Subject to Reasonable Interpretation and Are at Least as Precise as Like Rules and Statutes Sustained by the Courts 5

B. New York Times v. Sullivan Strengthens and Emphasizes the Validity of the Challenged Rules 6

C. There Is No Basis or Authority for the RTNDA Holding That Similar Standards Are Applicable in Determining the Constitutional Propriety of Regulations Involving Broadcast as Compared With Press Media 7

CONCLUSION 10

Table of Authorities

PAGE

Cases:

Associated Press v. United States, 326 U. S. 1 (1945) .. 10

Dombrowski v. Pfister, 380 U. S. 479 (1965) 9

Farmer's Union v. WDAY, 360 U. S. 525 (1959) 5, 7

Grosjean v. American Press Co., 297 U. S. 233 (1936) .. 9

NAACP v. Button, 371 U. S. 415 (1963) 9

National Broadcasting Co. v. United States, 319 U. S. 190 (1943) 4, 5, 7, 8

New York Times v. Sullivan, 376 U. S. 254 (1964) 4, 6, 7

Speiser v. Randall, 357 U. S. 513 (1958) 9

United Church of Christ v. F. C. C., 359 F. 2d 994 7

Constitutional Provision, Statutes and Rules:

United States Constitution:

First Amendment .....*passim*

Communications Act:

§315 ..... 5, 6

47 U. S. C. §§312, 502, 503(b) 7

"Fairness Doctrine" of the Federal Communications Commission:

Personal Attack Rule 3, 4, 5, 8

Political Editorializing Rule 3, 4, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 2 and 717

RED LION BROADCASTING CO., INC., *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

---

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

—v.—

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *et al.*

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus**

The American Civil Liberties Union is a private, non-profit agency engaged solely in the defense and extension of the Bill of Rights. Among its other interests, it has

* Letters of consent to the filing of this brief from all parties have been filed with the Clerk of the Court.

been intimately concerned with the interaction of the First Amendment and broadcast communications policies. *Amicus* has an interest in the case at bar because it involves the question of the presentation of controversial issues of public importance.

This brief is principally submitted in support of the decision below in *Red Lion Broadcasting Company* and in opposition to the opinion below in *Radio Television News Directors Association.* The latter decision held, incorrectly we believe, that the First Amendment prohibits adoption of the Personal Attack and Political Editorializing Rules by the Federal Communications Commission.

Though we support the Personal Attack Rule itself, we do not support in every respect the procedural burdens which it places upon broadcasters. Thus, we believe that the purpose of the rules may be defeated if the broadcaster has the burden of searching out the attacked party in the first instance and sending him a transcript of the attack. We believe it adequate for broadcasters to be required to keep manuscripts of its broadcasts so that those who learn of an attack upon them, may have available the material to which they will reply after they have contacted the broadcaster.

Our brief is addressed primarily to the substance of the Personal Attack Rule and Political Editorializing Rule rather than to the enforcing procedures. However, we mention our reservations here so that the Court may be aware of them.

Statement of the Case

The cases before this Court involve challenges to two aspects of the "Fairness Doctrine" of the Federal Communications Commission. First and principally, the Personal Attack Rule; latterly, the Political Editorializing Rule.

In *Red Lion Broadcasting Company, Inc., et al.* v. *United States, et al.*, 381 F. 2d 908 [hereinafter referred to as *"Red Lion"*] the District of Columbia Circuit Court sustained the validity of an ad hoc order of the Federal Communications Commission which parallelled, in all relevant particulars, the later-promulgated Personal Attack Rule. In *Red Lion*, Station WGCB carried a broadcast by Rev. Billy James Hargis which included a personal attack upon Fred J. Cook, who had written a book concerning the 1964 Republican Presidential Campaign. Mr. Cook, learning about the attack on him and his book, wrote to Station WGCB requesting time to reply at the station's expense. The station responded by sending Mr. Cook a copy of a rate card with the suggestion that he notify the station concerning a time he might wish to purchase.

In *United States, et al.* v. *Radio and Television News Directors Association, et al.*, not as yet officially reported [hereinafter referred to as *"RTNDA"*] the Seventh Circuit Court of Appeals struck down as unconstitutional abridgments of the First Amendment, both the Personal Attack and Political Editorializing Rules.

ARGUMENT

The First Amendment does not command insulation of broadcasters from rules designed to effect fair access to public airwaves. The fairness doctrine and the rules thereunder are wholly within the ambit of the First Amendment and affirmatively foster the interests the Amendment was intended to serve.

The sweeping decision in *RTNDA* striking down the Personal Attack Rule was based upon three discrete premises. First, it was held that the Rules were too imprecisely and vaguely drafted, thereby providing inadequate guidance to licensees and necessarily inhibiting free speech. Secondly, the illegal burden on speech condemned by this Court in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964) was equated with allegedly "severe and immediate penalties" facing licensees as an "omnipresent threat" by reason of the Personal Attack and Political Editorializing Rules. Finally, the *RTNDA* Court found no longer valid the factual underpinning which formed the basis of this Court's decision in *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943), so that the standard it applied to the challenged rules was essentially the same as it would have applied to the rules purporting to govern access to newspapers and the press.

The *RTNDA* Court, it is respectfully submitted, was in fundamental error in each of its major conclusions.

A. *The Challenged Rules Are Subject to Reasonable Interpretation and Are at Least as Precise as Like Rules and Statutes Sustained by the Courts.*

As written, the Political Editorializing and Personal Attack Rules permit licensees to make fair determinations of when given broadcasts call for their application. Thus, for example, the petitioners in *Red Lion* have never seriously asserted that the broadcast statement for which the Personal Attack Rule was invoked was anything but a "personal attack • • • upon the honesty, character, integrity or like personal qualities of [Fred Cook]," the attacked party. Similarly, it should not be overly difficult in almost all instances for licensees to determine whether or not they have editorialized in favor of a political candidate during the course of a campaign. Of course, difficult questions of interpretation will arise, as is the case with all statutes, rules and regulations. The possibility or even probability of such a contingency, however, is hardly sufficient to invalidate the rules. In point of fact, the Personal Attack Rule is more sharply honed and self-explanatory than is the "public convenience, interest or necessity" standard under which the Federal Communications Commission is expressly authorized to operate under *National Broadcasting Co.* v. *United States, supra*, and which serves as the touchstone of Commission renewal decisions for all licensees. See *Farmer's Union* v. *WDAY*, 360 U. S. 525, 534 (1959). Moreover, in raising questions as to the meaning of certain aspects of the Personal Attack Rule, the *RTNDA* Court does nothing less than challenge §315 of the Communications Act. *Compare, Farmer's Union* v. *WDAY*, 360 U. S. 525 (1959). Thus, *RTNDA* focuses on the difficulty in distinguishing between editorials and news commentaries, a difficulty present in at

least equal proportion in determining the equal-time mandate of §315 itself. If a licensee is competent to distinguish between an editorial presentation and a "bona fide news documentary" sufficient to preserve the statute which sets forth such a distinction, it is at least equally capable of determing whether given statements are "attack[s] * * * made * * * during the presentation of views on a controversial issue of public importance * * * upon the honesty, character, integrity or like personal qualities of an identified person or group." As much as with any rules, those challenged here permit a licensee to make a reasoned judgment as to the statements meriting notice and offer of broadcast access and those which do not.

B. *New York Times v. Sullivan Strengthens and Emphasises the Validity of the Challenged Rules.*

The *RTNDA* Court found that an "omnipresent threat of * * * severe and immediate penalties" was imposed upon all licensees by the existence of the challenged rules. As such, it found the rules to be as burdensome as the threat of the substantial libel judgment which this Court set aside in *New York Times*. Such a finding, however, was made possible only by a failure to acknowledge that the "severe and immediate penalties" referred to in *RTNDA*, see footnote 29, *cannot be invoked* when licensees make a good faith determination that the challenged rules are inapplicable. Thus, the very line of demarcation set forth in *New York Times* as the touchstone of permissible libel sanctions—good faith error as opposed to malicious error, see 376 U. S. at 286, 287, 292—is the precise test employed in whether the "severe and immediate penalties" are to be invoked in the instant case. Only by indiscriminately lumping together as equiv-

alent "sanctions" the punishments set forth in 47 U. S. C. §§312, 502 and 503 (b) and the curative order, as in *Red Lion,* according broadcast access to a person "attacked" within the ambit of the rules, can those rules be said to pose any "omnipresent threat * * * of severe and immediate penalties." Yet, such a distinction articulates the very difference between threats of punishment condemned in *New York Times* and affirmative licensee obligations to provide broadcast time for various types of programs repeatedly upheld by this Court, e.g., *Farmers Union* v. *WDAY, supra* at p. 534.

Although the converse might well be argued, one can say that *New York Times* laid down tests for sanctions other than libel judgments. Similarly, one can agree as to its applicability to broadcast media. Under any circumstances, however, the *New York Times* insulation from sanction of only good faith error, precisely parallels the test applied in the case of the challenged rules.

C. *There Is No Basis or Authority for the RTNDA Holding That Similar Standards Are Applicable in Determining the Constitutional Propriety of Regulations Involving Broadcast as Compared With Press Media.*

RTNDA blithely reverses the holdings of this Court in *National Broadcasting Company* v. *United States, supra,* recently re-emphasized by the District of Columbia Circuit Court in *United Church of Christ* v. *Federal Communications Commission,* 359 F. 2d 994. Citing a table showing that there are more radio and television stations presently operating than general circulation newspapers, see footnote 46, a law review article, and *no* cases involving regulation of broadcast media, *RTNDA* finds that conditions of scarcity no longer prevail for broadcast channels, and that the

distinction between broadcast and press media set forth in *National Broadcasting Company* is therefore, and for other reasons, "logically meaningless." With respect to the assertion of a present absence of scarcity of broadcast channels, the decision fails to discuss the implication of network control of broadcasting. It fails to set forth data regarding the scarcity of available broadcast frequencies in major urban centers. *RTNDA* is nothing less than an attempted reversal of this Court, of consistent decisions by other appellate courts, and of the very rationale of the Communications Act.

The difference between a triennial review of a licensee's adherence to principles of fairness and general access, and the Personal Attack Rule is only to be found in the greater immediacy of public recourse and the wider range of curative means available in the latter instance. Thus, the instant case necessarily challenges the Fairness Doctrine itself and, even more broadly, the general authority of the Federal Communications Commission to deny renewal applications to licensees who have permitted personal attacks to be aired over the full period of licensure. The petitioners do not contest the wrongfulness, nor even the danger, of repeated unanswered personal attacks such as took place in *Red Lion*, and such as were found by the Federal Communications Commission to take place on a widespread, national basis. They seek only to deny any public recourse to remedy the condition.

The Personal Attack and Political Editorializing Rules provide for no censorship of program content. They do not involve the control of programming, even to the slightest degree. Their applicability is limited to an extremely narrow range of circumstances, relating largely to broadcasts for which a licensee had full opportunity for con-

scious reflection on program content prior to having aired the challenged statement. The rules do not even require that equal time be provided for the curative responsive broadcasts, once again leaving to licensees the authority to make good faith determinations as to whether fair and equal access had previously been accorded, and if not, the time and nature of the responsive broadcast.

In an earlier era, "liberty of contract" was elevated to the level of constitutional principle. Such a determination was not wholly arbitrary, for the freedom of contracting parties from governmental interference had been a vital historic fact in allowing for development from a feudal, "status" society to a more libertarian, "contract" society. Yet, later growth of disproportion in bargaining strength between contracting parties made application of a "liberty of contract" theory the very means by which individuals with lesser bargaining strength could almost literally be returned to feudal status by straightforward application of the very contract law doctrines which had previously been liberating. Similarly, First Amendment freedoms, which in an era of free and easy access to communication media might arguably have been best served by total insulation from government regulation, are subverted in a circumstance of scarcity and monopoly of such media.

There is not present here a risk to free speech occasioned by a desire to inhibit disloyalty, *Speiser* v. *Randall*, 357 U.S. 513 (1958); or subversion, *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); or barratry, *NAACP* v. *Button*, 371 U.S. 415 (1963). Risks to free speech are not here measured against community tax needs. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). Here, any risks to free speech must be measured against the possibility that broadcasting will not foster "the widest possible dissemination of informa-

tion from diverse and antagonistic sources," which this Court has held to be the fundamental "assumption" on which the First Amendment rests. *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).

> "the widest possible dissemination of information from diverse and antagonistic sources." (*Id.* at 20.)

Viewed in this light, and in terms of the other considerations applicable herein, the First Amendment can hardly be said to foreclose so restrained and moderate, and yet so necessary a procedure as that encompassed by the challenged rules.

CONCLUSION

For the foregoing reasons this Court is respectfully requested to sustain the determination in *Red Lion Broadcasting Co., Inc.* v. *United States*, 381 F. 2d 908, and to reverse the determination in *United States, et al.* v. *Radio and Television News Directors Association, et al.*

Respectfully submitted,

MICHAEL J. HOROWITZ
401 Broadway
New York, New York 10013
Attorney for American Civil Liberties Union

MELVIN L. WULF
ELEANOR HOLMES NORTON
156 Fifth Avenue
New York, New York 10010
Of Counsel

March, 1969